

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CHARLES DANIELS
Claimant

VS.

AMERICOLD CORP.
Respondent

AND

TRAVELERS INDEMNITY COMPANY
Insurance Carrier

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Docket No. 189,238

ORDER

Respondent and its insurance carrier requested review of the Award dated October 30, 1995, entered by Administrative Law Judge Robert H. Foerschler. The Appeals Board heard oral argument on January 16, 1996.

APPEARANCES

Donald T. Taylor of Kansas City, Kansas, appeared for the claimant. Kenneth J. Hursh of Overland Park, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge found claimant permanently and totally disabled as a result of claimant's exposure to smoke and chemicals while working for the respondent between December 29, 1991, and December 18, 1993. Respondent and its insurance carrier requested the Appeals Board to review the issues (1) whether claimant sustained personal injury by accident arising out of and in the course of employment with respondent and (2) whether testimony by the physician whom the Administrative Law Judge selected to provide an independent medical evaluation was properly considered. Claimant requested the Appeals Board to review the issue (3) whether the Administrative Law Judge properly reduced the Award due to preexisting impairment. Those are the issues before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be modified.

(1) The principal issue in this proceeding is whether claimant's kidney failure is related to an exposure to chemicals and smoke while working for the respondent during the period of December 29, 1991, through December 18, 1993. The Administrative Law Judge determined that issue in claimant's favor and found it was more probably true than not that such exposure substantially contributed to claimant's chronic renal failure. The Administrative Law Judge found claimant's repeated exposure to smoke and chemicals constituted a series of microtraumas which culminated on December 18, 1993, the date represented as claimant's last day of work for the respondent.

Respondent and its insurance carrier contend claimant failed to establish a causal link between the work place and his kidney failure which has resulted in end-stage renal disease and chronic dialysis.

Claimant testified he worked for the respondent approximately 30 years. Although he knew he had hypertension before December 28, 1991, it was under control and he felt he was in good health. The first time anyone told claimant he had any type of kidney problem was in January 1994.

On December 28, 1991, a fire started in respondent's storage caves. In its efforts to combat the fire, respondent sent claimant and others into the caves to build walls to contain the smoke and to attempt to smother the fire. Claimant testified he worked within 50 feet of the fire without special breathing apparatus and for two months was exposed to smoke and intense heat which caused profuse sweating. While the fire raged claimant worked 12- to 14- hour days six days per week. Once the fire was extinguished claimant worked 12-hour days for one to three months assisting a cleaning company clean ceilings

and walls. After the initial fire and cleanup, claimant's job duties reverted to those of a general maintenance lead man.

The cave facility was never completely cleaned and claimant and his coworkers continued to smell strong odors of smoke and chemicals. During the final months claimant worked for the respondent in 1993, claimant worked in the area where the smoke from the fire was channeled. He removed food product which had been contaminated by the smoke. As time progressed, claimant began to feel weak and nauseous and began to experience chills. At that point claimant discontinued work, sought medical treatment, and was hospitalized and placed on dialysis.

Due to the nature of the alleged injury, expert medical evidence is essential to establish a causal relationship. Claimant presented the testimony of board-certified internist John A. Holmes, M.D. Dr. Holmes is a former clinical instructor and clinical assistant professor at the Kansas University Medical Center. Respondent presented the testimony of pharmacologist and toxicologist John Doull, Ph.D., M.D., a professor emeritus of pharmacology for the Kansas University Medical Center. Both doctors possess impressive credentials.

Dr. Holmes, whom the Administrative Law Judge initially selected to perform an independent medical evaluation, diagnosed claimant's present condition as chronic renal failure secondary to IgA nephropathy. IgA nephropathy, which is also known as glomerulonephritis, is a condition where the kidneys lose both the ability to properly filter toxins from the blood stream and the ability to make concentrated urine. When asked his opinion whether claimant's renal failure was causally related to an exposure to hydrocarbons at work, Dr. Holmes said:

"A. (Dr. Holmes) Certainly accelerated and exacerbated are two terms that you could use without any hesitation. Again, we don't know when he first got his IgA nephropathy. We don't have any evidence until after his work exposure, and all I can say on that, it could have been the exposure but I can't be 100 percent sure.

"Q. (Mr. Taylor) But you -- based upon a reasonable medical certainty you believe or you are of the opinion that his exposure did exacerbate or accelerate or aggravate his condition?

"A. Certainly.

"Q. What does end-stage renal failure mean?

"A. End-stage renal failure basically is a very generic term that means you're dialysis dependent.

"Q. Was there anything in the medical history or medical records that you examined that indicated that Mr. Daniels was in end-stage prior to his work exposure?

"A. No.

"Q. Assuming Mr. Daniels had some form of renal problems prior to the exposure, would a person with a renal condition be more susceptible to aggravation or acceleration by exposure to any amount of hydrocarbons?

"A. Yes, and particularly in this setting with the increased heat. Any -- Any kidney toxin, it's [sic] effects are multiplied by dehydration or near dehydration so, you know, you would have to assume that going into these -- And he talks about how hot it was. Going into these places for half an hour at a time, he probably perspired profusely and was somewhat volume depleted at the time."

Dr. Holmes' causation opinion is founded upon his belief that claimant was exposed to high concentrations of extremely toxic hydrocarbons such as pentane, benzene, and toluene. Dr. Holmes also testified that his review of claimant's medical records indicates that before the fire in respondent's caves claimant had both hypertension and some kidney disease. However, there was no evidence that claimant had IgA nephropathy before that time. On cross-examination, the doctor admitted that claimant's kidney disorder was of such type that hypertension could be a contributing factor and that it is also possible claimant's kidney disease could be idiopathic.

Dr. Doull, a clinical toxicologist, testified that he was a charter member and past president of the Society of Toxicology, past president of the American Board of Toxicology, present chair of the Threshold Limit Value Committee of the American Conference of Governmental Industrial Hygienists (ACGIH), and a member of the President's Clean Air Commission. Dr. Doull did not examine claimant but he did review a portion of claimant's medical records.

Based upon his belief that claimant was not exposed to hydrocarbon concentrations in excess of the safe levels set by the ACGIH, Dr. Doull does not believe claimant's exposure to hydrocarbons given off by the fire accelerated or contributed to the progression of claimant's kidney disease. Dr. Doull testified that IgA nephropathy is an immune disease the medical community assumes is induced by viral or environmental antigens. Although the doctor concedes hydrocarbons have been proven to cause a type of kidney disease known as Goodpasture's, claimant does not have that disease. Based upon the current status of medical research, the doctor does not agree that exposure to hydrocarbons cause kidney disease or disorders other than Goodpasture's. Dr. Doull premises his opinions on the belief that claimant was exposed to extremely low hydrocarbon concentrations as indicated by reports from the EPA and Midwest Research

Institute. Also, he did not consider the additional elements of heat and dehydration and their potential effects upon the kidneys. On cross-examination, Dr. Doull admitted it was difficult to provide an opinion regarding causation when the actual levels of claimant's exposure are not known. However, the doctor does admit that reports from the nation's Center for Disease Control indicate concentration levels of toxic substances in the caves were much higher than levels measured by the EPA and Midwest Research Institute. He was also unaware that claimant worked in the caves for such a long period of time.

The question regarding causation of claimant's kidney failure is a very close one. Both physicians who testified have impressive credentials and are credible. However, in this instance, the Appeals Board is persuaded somewhat more by Dr. Holmes. He was selected by the Administrative Law Judge to provide a neutral and independent evaluation and opinion. Also, it appears that Dr. Holmes considered the potential effects heat and dehydration might have had upon claimant during the period in question.

When considering the entire record as a whole, the Appeals Board agrees with the Administrative Law Judge that claimant's renal failure which has rendered him permanently and totally disabled was either caused or substantially aggravated and contributed to by claimant's exposure to smoke, gases, and chemical residue during the period of December 29, 1991, through claimant's last day of work of December 18, 1993. Although this factual situation may have potentially been addressed as an occupational disease rather than an accidental injury, the Appeals Board has conducted this review as involving an accidental injury because both the parties and the Administrative Law Judge approached it in that manner.

(2) For the first time in this proceeding, the respondent and its insurance carrier now raise the issues whether the Administrative Law Judge had the authority to refer claimant to Dr. Holmes for an independent medical evaluation and whether Dr. Holmes' testimony should be considered as part of the evidentiary record.

Because those issues were not presented to the Administrative Law Judge, the Appeals Board will not address them for the first time on appeal. See K.S.A. 1996 Supp. 44-555c which limits the Board's review to legal and factual issues presented to the Administrative Law Judge.

(3) The Administrative Law Judge reduced claimant's permanent total disability award from \$125,000 to \$75,000 based on the finding that claimant had a 40 percent loss of kidney function before the December 29, 1991, fire. The Appeals Board finds that claimant's award should not be reduced. The Administrative Law Judge based his decision to reduce the award upon Dr. Holmes' testimony that claimant may have had a 40 percent loss of kidney function before the fire. That opinion was based upon the doctor's mistaken belief that claimant had a serum creatinine level of 2.5 before the fire. However, claimant actually had normal or close to normal creatinine levels before December 1991. After that error was brought to the doctor's attention, neither party asked the doctor to reconsider his

opinion regarding claimant's loss of kidney function before the fire. Therefore, the record fails to establish to what extent, if any, claimant was impaired before the start of the cave fire in December 1991.

Furthermore, assuming for a moment it is even proper to deduct preexisting functional impairment from an award of permanent total disability and also assuming arguendo that claimant did have a 40 percent loss of kidney function before the cave fire, the record does not establish how the alleged preexisting kidney loss converts to a whole body functional impairment rating.

The Award should be modified to award claimant permanent total disability benefits without reduction for preexisting impairment.

(4) The Appeals Board hereby adopts the Administrative Law Judge's findings and conclusions to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated October 30, 1995, entered by Administrative Law Judge Robert H. Foerschler should be, and hereby is, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Charles Daniels, and against the respondent, Americold Corp., and its insurance carrier, Travelers Indemnity Company, for an accidental injury on December 18, 1993, and based upon an average weekly wage of \$553.25 for 399.36 weeks of permanent total disability benefits, making a total award of \$125,000.

As of March 31, 1997, there is due and owing claimant 171.29 weeks of permanent total disability compensation at the rate of \$313 per week or \$53,613.77, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$71,386.23 is to be paid for 228.07 weeks at the rate of \$313 per week, until \$125,000 is paid or until further order of the Director.

The Appeals Board hereby adopts the remaining orders set forth by the Administrative Law Judge in the Award to the extent that they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Donald T. Taylor, Kansas City, KS
Kenneth J. Hursh, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director